

1 Chief Judge Ricardo S. Martinez
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 v.

12 HUAWEI DEVICE CO., LTD., and
13 HUAWEI DEVICE USA, INC.,

14 *Defendants.*

15 No. 19-CR-010

16 **REPLY MEMORANDUM IN
17 SUPPORT OF DEFENDANTS'
18 MOTION TO STRIKE
19 SURPLUSAGE**

20 **NOTE ON MOTION CALENDAR:
21 August 30, 2019**

22 ***ORAL ARGUMENT SCHEDULED
23 FOR OCTOBER 7, 2019***

24 **INTRODUCTION**

25 Rather than contest Huawei Device's arguments that the alleged House Committee
26 report, two dated civil lawsuits, and a post-hoc bonus program (Ind. ¶¶ 38, 47, 48) are irrelevant
27 and prejudicial surplusage, the government urges a "no harm, no foul" position by asking the
Court to deny the motion because the Indictment will not be read or provided to the jury. The
Court should reject the government's position and grant this motion because Huawei Device
would suffer ongoing prejudice and tainting of the jury pool if this inflammatory material is
permitted to remain in the Indictment. Indeed, the Court need only review the government's
opposition to Huawei Device's Motion to Dismiss for Selective Prosecution to see how the
government has used, and will continue to use, these irrelevant allegations to make highly
prejudicial and baseless claims that Huawei Device is a recidivist offender with a long history of
wrongdoing. The Court should strike this prejudicial surplusage from the Indictment.

1 At a minimum, if the government's representations about the Court's standard practice
 2 are correct, Huawei Device alternatively requests that the Court enter an order confirming that
 3 the Indictment not be read or provided to the jury at trial.

4 **ARGUMENT**

5 The government seeks denial of Huawei Device's motion solely by arguing that Huawei
 6 Device will suffer no prejudice if the Court follows the "standard practice" of not reading or
 7 providing the Indictment to the jury. Opp'n Mot. to Strike Surplusage, Dkt. 62 ("Opp'n") at 3.
 8 The government does not deny the substantial prejudice Huawei Device will face if, counter to
 9 the government's "assumption," the jury is exposed to the irrelevant and prejudicial allegations
 10 in paragraphs 38, 47 and 48 in the Indictment. Nor does the government contest that the
 11 evidence is irrelevant.¹ The Court should deem the government's failure to address these issues
 12 as a concession that the allegations are irrelevant and prejudicial. *See United States v. Villa*, 595
 13 F. App'x 734, 735 (9th Cir. 2015) ("The government did not address this contention in its brief
 14 and conceded at oral argument that its failure to do so constitutes waiver. We agree."); *United*
 15 *States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011) (holding that the government waived an
 16 available argument that it failed to assert in its answering brief).

17 The government's position assumes incorrectly that Huawei Device would only suffer
 18 prejudice from these irrelevant allegations if they are shown to the trial jury. On the contrary,
 19 the inclusion of surplusage in an indictment also prejudices a defendant by potentially tainting
 20 the jury pool. As one court aptly stated in striking surplusage from an indictment:

21 It also is clear that indictments are public documents that, like
 22 governmental press statements, often are widely reported through the
 23 media. In this sense, when an indictment contains surplusage that goes
 24 beyond its limited purpose of charging a party before the court, that
 25 surplusage operates much like an extrajudicial statement in its likely
 26 impact and potential for prejudice.

27

 28 ¹ Instead, the government states it will address the relevancy of the allegations when it "responds
 substantively" to Defendants' Motion to Exclude Irrelevant and Prejudicial Evidence. Opp'n at 5. In its response to
 that motion, however, the government does not even attempt to explain the relevance of the allegations. Instead, it
 asserts that Huawei Device's motion is premature. For the reasons stated in Huawei Device's reply memorandum in
 support of that motion, the government is incorrect.

1 *United States v. Cooper*, 384 F. Supp. 2d 958, 961 (W.D. Va. 2005) (striking a “preamble”
 2 containing references to defendant’s past dealings with environmental and health agencies in a
 3 criminal Clean Water Act case; such references were analogous to improper extrajudicial
 4 statements by a prosecutor about a defendant’s reputation or criminal history).

5 Similarly, Huawei Device has already suffered substantial prejudice by the inclusion of
 6 these improper allegations in the Indictment. Given the publicity this case has received—based
 7 in no small part on the press conference announcing the Indictment by the highest law
 8 enforcement officials in the U.S. government—there is a real and meaningful risk that the jury
 9 pool has already been and will continue to be tainted by the inclusion of these irrelevant and
 10 prejudicial allegations in the Indictment. The Department of Justice press release announcing the
 11 Indictment even highlighted one of the prejudicial and irrelevant allegations, stating: “As part of
 12 its investigation, FBI obtained emails revealing that in July 2013, Huawei offered bonuses to
 13 employees based on the value of information they stole from other companies around the world .
 14 . . .”² Unsurprisingly, media reports about this case have repeated this irrelevant and prejudicial
 15 claim. One particularly critical editorial noted that “Huawei even created a bonus program for
 16 workers who stole information from competitors.”³ Other media reports have parroted the
 17 Indictment to report that Huawei was “very nervous about having been caught” in the alleged
 18 thefts from T-Mobile because of the previous House Committee report and the Motorola and
 19 Cisco lawsuits.⁴

20 This tainting of the jury pool has been exacerbated by the government’s over-the-top
 21 rhetoric and heavy reliance on these irrelevant and prejudicial allegations in its response to
 22

23 ² See Press Release, U.S. Dep’t of Justice, Chinese Telecommunications Device Manufacturer and its U.S.
 24 Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction of Justice, Jan. 28, 2019,
<https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade>.

25 ³ See Editorial, *The Huawei Indictment Tells A Story of Deceit and Corporate Espionage*, Wash. Post, Jan.
 26 29, 2019, https://www.washingtonpost.com/opinions/global-opinions/the-huawei-indictment-tells-a-story-of-deceit-and-corporate-espionage/2019/01/29/c2035abe-23f4-11e9-90cd-dedb0c92dc17_story.html.

27 ⁴ See, e.g., Laurel Wamsley, *A Robot Named ‘Tappy’: Huawei Conspired to Steal T-Mobile’s Trade*
 28 *Secrets, Says DOJ*, NPR, Jan. 29, 2019, <https://www.npr.org/2019/01/29/689663720/a-robot-named-tappy-huawei-conspired-to-steal-t-mobile-s-trade-secrets-says-doj>.

1 Huawei Device's Motion to Dismiss for Selective Prosecution. At a minimum, this prejudice
2 will need to be addressed during the jury selection process. The Court should strike this
3 surplusage now to stop the damage and prevent the government from continuing to taint the jury
4 pool with ongoing baseless, prejudicial claims about Huawei's purported criminal history.

5 If the government's representations about the Court's standard practice are correct,
6 Huawei Device alternatively requests that the Court enter an order confirming that the
7 Indictment not be read or provided to the jury at trial. A proposed order reflecting this relief is
8 attached as an alternative to the proposed order submitted with Huawei Device's opening motion
9 to strike.

10 **CONCLUSION**

11 For the reasons set forth above, the Court should grant this motion to strike as surplusage
12 the irrelevant and prejudicial paragraphs 38, 47, and 48 in the Indictment. Alternatively, the
13 Court should order that the Indictment not be read or provided to the jury in any form.

14 Respectfully submitted,

15 Dated: August 30, 2019

16 **YARMUTH LLP**

17 By: s/ Robert Westinghouse
18 Robert Westinghouse, WSB No. 6484
19 1420 Fifth Avenue, Suite 1400
20 Seattle, WA 98101
21 Telephone: (206) 516-3800
22 Fax: (206) 516-3888
23 rwestinghouse@yarmuth.com

24 **STEPTOE & JOHNSON LLP**

25 James F. Hibey (*pro hac vice*)
26 Brian M. Heberlig (*pro hac vice*)
27 1330 Connecticut Avenue, NW
28 Washington, DC 20036
Telephone: (202) 429-3000
Fax: (202) 429-3902
jhibey@steptoe.com
bheberlig@steptoe.com

29 *Attorneys for Defendants Huawei Device
30 Co., Ltd., and Huawei Device USA, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Attorneys for the Government

Todd Greenberg
Thomas M. Woods
Siddharth Velamoor
U.S. Attorney's Office (Sea)
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271
Tel: 206.553.7970
Todd.Greenberg4@usdoj.gov
Thomas.woods2@usdoj.gov
Siddharth.Velamoor@usdoj.gov

DATED: August 30, 2019, at Seattle, Washington.

s/ Vassie Skoulis

Vassie Skoulis, Legal Assistant

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE

4 UNITED STATES OF AMERICA,

5 v.

6 HUAWEI DEVICE CO., LTD., and
7 HUAWEI DEVICE USA, INC.,

8 *Defendants.*

9
10 No. 19-CR-010

11 **[PROPOSED] ORDER REGARDING**
12 **DEFENDANTS' MOTION TO**
13 **STRIKE SURPLUSAGE**

14 The Court has reviewed Huawei Device's Motion to Strike Surplusage, the Government's
15 Response, and Huawei Device's Reply Memorandum.

16 The motion is granted for the reasons stated by Huawei Device.

17 Accordingly, the Indictment will not be read to or otherwise presented to the jury in this
18 case.

19 IT IS SO ORDERED.

20 _____
21 Ricardo S. Martinez
22 Chief United States District Judge